

# VARIANCE OR APPEAL APPLICATION



TOWN OF CHAPEL HILL

Planning Department

405 Martin Luther King Jr. Blvd.

phone (919) 969-5040

fax (919) 969-2014

www.townofchapelhill.org

## Section A: Project Information

Parcel Identifier Number  
(PIN):

Date:

6.28.2019

Project Name:

HDC COA APPLICATION

Property Address:

306 N. BOUNDARY ST

Zip

Code:

27514

Existing Zoning  
District:

Description of  
Request:

APPEAL HDC DECISION TO GRANT COA

TO APPLICANTS OF 306 N. BOUNDARY ST

AT HDC MEETING ON APRIL 22, 2019

## Section B: Applicant, Owner, and/or Contract Purchaser Information

**Applicant Information** (to whom correspondence will be mailed):

Name:

WALTER WOODROW BURNS JR MD

Address:

609 NORTH ST

City:

CHAPEL HILL

State:

NC

Zip

Code:

27514

Phone:

919-929-7313

Email:

WOODROWBURNS@MSN.COM

919-451-8289 (C)

The undersigned applicant hereby certifies that, to the best of their knowledge and belief, all information supplied with this application is true and accurate.

Signature:

Walter Woodrow Burns Jr

Date:

6.28.2019

Owner/Contract Purchaser Information: NA

Owner

Contract Purchaser

Name: \_\_\_\_\_

Address : \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip Code: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

The undersigned applicant hereby certifies that, to the best of their knowledge and belief, all information supplied with this application is true and accurate.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_



## VARIANCE OR APPEAL APPLICATION SUBMITTAL REQUIREMENTS

TOWN OF CHAPEL HILL

Planning & Development Services

Variances and Appeals may be granted by the Board of Adjustment for dimensional regulations, water and sewer regulations, steep slope regulations, house size limitations, Resource Conservation District regulations, Jordan Buffer regulations, and Watershed Protection District regulations. The following must accompany your application. Failure to do so will result in your application being considered incomplete.

<input type="checkbox"/>	Application fee ( <a href="#">refer to fee schedule</a> )	Amount Paid \$	<input type="text"/>
<input type="checkbox"/>	Digital Files - provide digital files of all plans and documents		
<input type="checkbox"/>	Mailing list of owners of property within 1,000 foot perimeter of subject property ( <a href="#">see GIS notification tool</a> )		
<input type="checkbox"/>	Mailing fee for above mailing list	Amount Paid \$	<input type="text"/>

X	Written Narrative describing the proposal - <i>SEE ENCLOSED</i>
	Statement of Justification - Respond to subsection 4.12.2(a)(1-4) of the Land Use Management Ordinance.
	Recorded Plat or Deed of Property
	Stream Determination - necessary for all submittals
	Jurisdictional Wetland Determination - if applicable
	Reduced Site Plan Set (reduced to 8.5" x 11")

Dimensional Variance

Water and Sewer Variance

Steep Slope Variance

House Size Variance

Resource Conservation District Variance

Jordan Watershed Riparian Buffer Variance

Watershed Protection District Variance

Appeal *HDC DECISION APPROVING COA APPLICATION FOR 306 N. BOUNDARY ST. AT APRIL 22 2019 HDC MEETING*

Standing: Explain to the Board how the applicant is an aggrieved party. (NC General Statute Sec. 160A-388(b1))

(1) *NC GENERAL STATUTE 160A-393 - REF: QUASI-JUDICIAL HANDBOOK pg 30 BY DAVID OWEN, ADAM LOVELADY*  
 Statement of Justification: Provide justification for decision that is being appealed.  
*SEE ENCLOSED*



## VARIANCE OR APPEAL APPLICATION SUBMITTAL REQUIREMENTS

TOWN OF CHAPEL HILL  
Planning & Development Services

Plan Sets (2 copies to be submitted no larger than 24" x 36")

Plans should be legible and clearly drawn. All plan set sheets should include the following:

- Project Name
- Legend
- Labels
- North Arrow (North oriented toward top of page)
- Property Boundaries with bearing and distances
- Scale (Engineering), denoted graphically and numerically
- Setbacks
- Streams, RCD Boundary, Jordan Riparian Buffer Boundary, Floodplain, and Wetlands Boundary, where applicable

☐

### Area Map

- a) Overlay Districts
- b) 1,000 foot notification boundary

☐

### Detailed Site Plan



BERIWAL MADHU  
304 N BOUNDARY ST  
CHAPEL HILL  
NC  
27514

HUNT PAULA  
310 N BOUNDARY ST  
CHAPEL HILL  
NC  
275147800

HEMSEY DAVID F  
504 N BOUNDARY ST  
Chapel Hill  
NC  
27514

FRENCH DRUSCILLA  
8230 LEESBURG PIKE  
VIENNA  
VA  
22182

DOHLMAN HENRIK G  
508 N BOUNDARY ST  
CHAPEL HILL  
NC  
27514

BURNS W WOODROW JR  
609 NORTH ST  
CHAPEL HILL  
NC  
275143730

ERREDE BEVERLY J TR  
512 N BOUNDARY ST  
CHAPEL HILL  
NC  
275147838

NOTICE OF APPEAL TO THE BOARD OF ADJUSTMENT OF THE TOWN OF CHAPEL HILL  
FROM THE PROCEEDINGS OF THE HISTORIC DISTRICT COMMISSION  
APPLICATION 19-007 FOR CERTIFICATES OF APPROPRIATENESS  
PROJECT NO. 18-130  
306 NORTH BOUNDARY STREET

Appeal filed by Dr. Walter Woodrow Burns, Jr. and Catharine G. Burns,  
609 North Street, Chapel Hill, NC 27514

Applicable Law:

The Town of Chapel Hill Historic District Commission (HDC) is required to follow the requirements of North Carolina law regarding the grant of a Certificate of Appropriateness (COA). In this case, the Town of Chapel Hill failed to follow the law, with the result that our due process rights – included the use, enjoyment and value of our property - were violated. We appeal the decision of the HDC to grant a Certificate of Appropriateness to the applicant and their clients, the property owners of 306 North Boundary Street.

In considering an application for a Certificate of Appropriateness, the Town of Chapel Hill Historic District Commission ***must***:

- Judge whether a proposed project is congruent with the special character of the historic district – in this case the Franklin-Rosemary Historic District – as determined and documented in the officially adopted “Significance Report” for the district. The Town and HDC failed to do so in this case.
- Once the special character of the historic district is reviewed and understood, the Historic District Commission is required to determine whether the project for which a COA has been requested is congruent with that character by applying its formally adopted and approved Design Guidelines. While other provisions of the Chapel Hill ordinance are to be considered – where relevant and consistent with state law – the Town of Chapel Hill endeavored to prevent the HDC Commissioners from properly applying these required, controlling Guidelines. In some instances, the Commissioners properly applied the Guidelines – despite the incorrect direction from Town representatives – but in other instances they failed to do so, in violation of our due process rights.

The applicable, controlling state law is found in the North Carolina General Statute §160A-400 and following. For a layman’s explanation of these requirements, the UNC School of Government has provided significant and clear guidance. We submitted to the HDC and they received into evidence in this case the article “*What is the Special Character of the Historic District?*” by Professor Adam Lovelady, which is posted (3/23/2017) on the UNC SOG’s online COATES’ CANONS and was also published elsewhere and widely available to local governments.

### Standing:

The Historic District Commission acknowledged and made a finding that Dr. and Mrs. Burns have standing in this case. The basis of our standing is that the property for which a Certificate of Appropriateness was sought – 306 North Boundary Street – is adjacent to our property at 609 North Street and together these parcels form the critical core of the historic William C. Coker Estate and are jointly the subject of a perpetual conservation and historic preservation easement. Efforts at the behest of the current owners of 306 North Boundary St. to extinguish this easement were illegal and will be the subject of litigation.

The significant importance of the Coker Estate to the community is based on the contributions of Dr. William Chambers Coker – a renowned botanist – to the history and physical development of both the Town of Chapel Hill and the campus of the University of North Carolina. This significance led in 1985 to the recording of a perpetual conservation and historic preservation easement, which explicitly covered both the 1.75 acre property at 306 North Boundary Street and the 2.88 acre property now identified as 609 North Street. The recording of the easement was in compliance with North Carolina law (the Conservation and Historic Preservation Easement Act) and Section 170(h) of the U.S. Internal Revenue Code. Dr. Burns and the other owners of the 4+ acre parcel were required by the University of North Carolina to negotiate and record the easement in order to ensure that this property would be protected in perpetuity.

Dr. Burns has endeavored in his almost 35-year ownership of his property to live up to his commitment and to ensure that its purpose is achieved – and continues to do so. In 2017 he listed his property for sale and prominently highlighted the distinction, requirements and limitations of the perpetual easement.

The North Carolina Statute that determines whether a party has standing is General Statute § 160A-393.

### Basis for Appeal:

We file this appeal under Section 160A-393 in the nature of certiorari. The review by the Board of Adjustment is to be based solely on the record before the Historic District Commission. Since the rules of the Board of Adjustment that are made available to the public relate to evidentiary proceedings, much of what is required and the procedure to be followed is unclear to us. We believe the following will sufficiently inform the Board of what we seek for you to review in our appeal until we informed of a schedule for filling of more detailed information:

- 1) In December 2018, the Town of Chapel Hill staff improperly certified the application filed by the architect-representative of Cumbie-French (current owners of 306 N. Boundary St.) as being complete and including all information that the Historic District Commission needed from the applicants and their clients in order to begin consideration of – or properly determine - whether the application could be granted under the law. The

application did not include critical information – most notably, but not exclusively, site plans and details on proposed treatment of the historic landscape.

- 2) The application – on its face – made clear that the “architect-representative” filing the application was not the actual architect who had designed the proposed project. This caused delays in the consideration of the case because the “architect representative” was unable to answer the Commissioner’s questions and the actual out-of-state architect did not attend most of the proceedings and did not testify – and therefore could not be cross examined.
- 3) The Town did not provide the required 10 days notice to the public – including Dr. and Mrs. Burns – prior to the January 2019 meeting at which the case was first considered. The Town posted the application materials with only 3 business days notice. The Town and HDC refused to remove the item from the agenda when the Burns pointed out the Town’s failure and requested that it be delayed. The Historic District Commission improperly proceeded to hear the case because the Chair stated that the staff had assured him that all notice requirements had been met. The Town staff failed to acknowledge their clear error and allowed the Commission to proceed – to the detriment of the Burns. Furthermore, the Town staff continually failed to give notice at critical times throughout the consideration of the case. The negative consequences – preventing fair and proper consideration of the case by the HDC – compounded.
- 4) The HDC failed to follow its duly adopted *Rules of Procedure* in other instances as well.
- 5) When the Historic District Commission members pointed out at the January 2019 meeting that they could not consider the case without a landscape plan and details with respect to the protection of existing landscape features, the Town staff failed to suspend consideration of the application – and tolling of the 180 day time limit. The clock and calendar should have been reset until the applicants provided the information required.
- 6) As the case proceeded, the Town of Chapel Hill Planning Department staff failed to provide to the members of the Historic District Commission the Significance Report, on which they are required to base their decision on district character and congruency.
- 7) The Town of Chapel Hill Planning Department staff, who are obligated to provide the required evidence that the HDC needs to properly enforce the law, failed to do so. The “staff report” consisted merely of an incomplete list of sections of the Design Guidelines
- 8) The contract counsel to the HDC improperly inserted himself and his unfounded opinions into the proceedings of the HDC in this case. Early in the case he improperly stated that the Commissioners were not allowed to consider the existence of the perpetual conservation/historic preservation easement which had been in place since 1985 and was illegally and in violation of public trust law ‘extinguished’ at the insistence of the



applicant. The contract counsel refused to provide the basis for his opinion and direction to the HDC when requested by the Burns. We were unable to refute his position because he never explained his rationale in public or put it in writing.

- 9) Staff refused to transmit the memo addressed to the Acting Chair that the Burns submitted in March with the express request that it be provided to Commissioners in advance of the March meeting and that we be given a chance to have these procedural issues addressed before further consideration of the case. Furthermore, the Town holds out to the public in its web site that messages may be sent to HDC members. The contents of the memo were also submitted through this link – but presumably staff intercepted this message and improperly prevented its delivery to Commissioners.
- 10) The Acting Chair prevented the Burns from fully presenting our case before the Commission. Despite the fact that we had been recognized as having standing – and should have been afforded rights as a party – he stated that we were allowed only 5 minutes to present our entire case. Consequently, we were unable to present the evidence and arguments before the Commission and were only allowed to submit a PowerPoint and other materials in writing – but cut off from any meaningful presentation.
- 11) The Town staff improperly, selectively posted evidence from this case under a “Current Issues” tab of the Town of Chapel Hill website. This action was inconsistent with posting in other cases and improperly distorted information available to the public.
- 12) Members of the HDC based their votes on improper standards, with no basis in law, that they articulated without comment or correction by either the staff of the contract counsel – who otherwise interjected opinion and direction.
- 13) The Acting Chair improperly characterized the expert testimony report submitted by Catharine Burns – who has been recognized as an expert in historic preservation in multiple courts and forums and was acknowledged as such in this proceeding – as biased and to be disregarded by the Commissioners during deliberations. He had never questioned her credentials or countered or questioned the substance of her written testimony when she would have had an opportunity to respond – but waited to attack her when no response was possible.
- 14) The contract counsel to the Commission – who has not been delegated any authority or properly recognized status by the Commission, but is paid by the Town of Chapel Hill with directions that are not clear to citizens – improperly, unfairly and incorrectly interrupted the Commissioners as they were deliberating and without authority directed their motions. The position that contract counsel takes that one section of the Chapel Hill Land Use Management Ordinance controls all deliberations and that the required Design Guidelines can only be applied as related to one – in this case inconsistent – section is wrong. State law controls. We were never allowed to counter his unfounded advice.

15) The HDC closed the public hearing at its regularly scheduled April meeting. After having given the applicants and owners repeated opportunities to add information, make arguments and submit additional evidence and argument, the evidentiary case was closed. The late hour (after 10:00 p.m.) meant that the HDC decided not to proceed with their deliberations and decisions that evening. Because the HDC still had other matters that they wanted to address, the case was continued for deliberations. There was no subsequent public notice of any potential that the evidentiary hearing could or would be reopened. Nevertheless, in violation of our rights – and denying us the opportunity to cross-examine their witnesses, present evidence or challenge or respond to the applicants' arguments -- a special meeting of the HDC was held on April 22, 2019. Despite recognition that it was unfair and likely illegal, the public hearing was reopened to allow only the applicant to present evidence. No notice was given to us as parties with standing - or to the informally named sunshine list, as is routine practice.

For these and other reasons that will be evident in a detailed review of the HDC proceedings, the Town of Chapel Hill violated our due process rights.

Relief Requested:

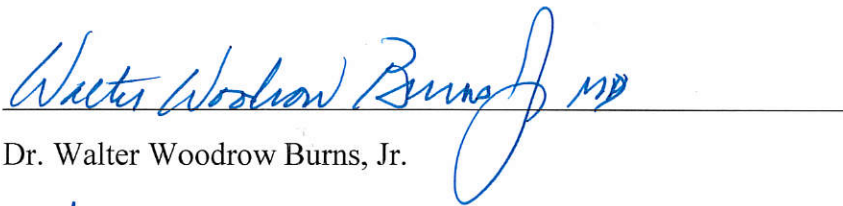
We appeal the grant of the Certificate of Appropriateness and request that the Board of Adjustment:

- Declare that the Certificate of Appropriateness granted May 30, 2019 is invalid.
- Require that the Town of Chapel Hill Planning Department and related consultants correct the record in this case, so that future applications to the HDC and the Town of Chapel Hill are based on required information regarding the significance of this property and other matters.
- Clarify for the Town of Chapel Hill Planning Department the proper procedure that they must follow with respect to the significance of the property and district under consideration in this and all future cases.
- Clarify for the Town of Chapel Hill that they must assist the members of the Historic District Commission to fully, consistently and with clear explanations apply the duly adopted and approved Historic District Guidelines in future proceedings in this case and all future cases.
- Make a finding that the Town of Chapel Hill's designated staff secretary certify as complete applications for Certificates of Appropriateness only when the applicant has supplied all required information for the Commissioners to make a fair and informed decision.
- Make a finding that the Town of Chapel Hill designated staff secretary for the Historic District Commission prepare thorough, complete and accurate minutes for proceedings – and accessible video segments rather than a tape of an entire meeting -- so that any

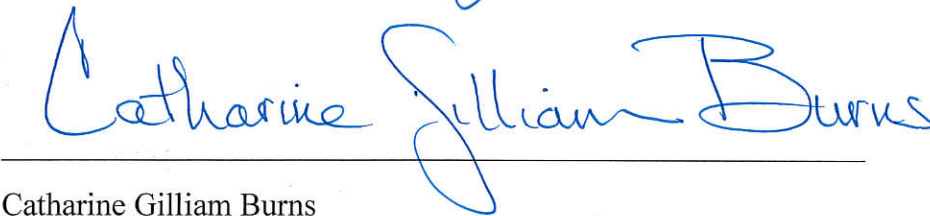
review and appeal can be accomplished accurately and without undue burden on members of the Board of Adjustment and parties.

- Find that the Town of Chapel Hill acted without substantial justification in failing to follow the state enabling legislation and recognized professional practice in the administration of this application – to the detriment of achieving its historic preservation policy and in violation of our due process rights to the use, enjoyment and value of our property.

Submitted to the Staff Liaison to the Board of Adjustment and to the Town Clerk of the Town of Chapel Hill on June 28, 2019.

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Dr. Walter Woodrow Burns, Jr.

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Catharine Gilliam Burns

NOTICE OF APPEAL TO THE BOARD OF ADJUSTMENT OF THE TOWN OF CHAPEL HILL  
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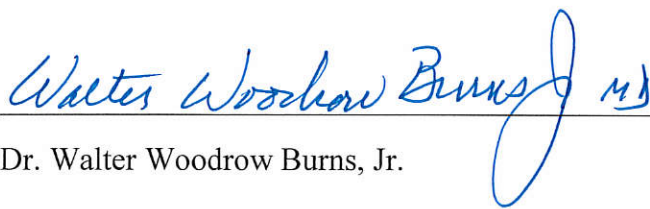
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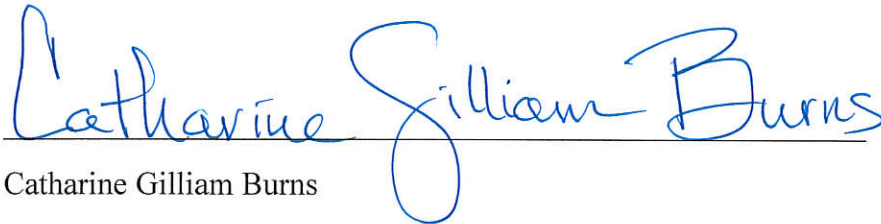
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Dr. Walter Woodrow Burns, Jr.

A handwritten signature in blue ink that reads "Catharine Gilliam Burns" with a large loop at the end of the last name. The signature is written over a horizontal line.

Catharine Gilliam Burns